No. 15-927

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

SCA HYGIENE PRODUCTS AKTIEBOLAG, *et al.*,

Petitioners,

v.

FIRST QUALITY BABY PRODUCTS, LLC, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE* UNIVERSAL REMOTE CONTROL, INC. IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether and to what extent the defense of laches may bar a claim for patent infringement brought within the Patent Act's six-year statutory limitations period, 35 U.S.C. § 286.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT..... 4

I. Laches Should Remain Applicable To Bar a Claim For Patent Infringement Brought Within The Six-Year Damages Limitations Period Established By 35 U.S.C. § 286 4

A. *Petrella's* Reliance on the Statute of Limitations in the Copyright Act Does Not Bar Laches In A Patent Case 4

B. The Federal Circuit Has Long Recognized That Laches Is Codified in the Patent Act Without Congressional or Supreme Court Correction 6

C. Without Laches, URC Would Have Faced Material Prejudice In Its Defense 10

Table of Contents

Page

D. The Application of Laches Does Not Unfairly Prejudice The Patentee 14

CONCLUSION 16

TABLE OF CITED AUTHORITIES

Page

CASES

A.C. Aukerman Co. v. R.L. Chaides Constr. Co.,
960 F.2d 1020 (Fed. Cir. 1992) ..... *passim*

Adelberg Labs, Inc. v. Miles, Inc.,
921 F.2d 1267 (Fed. Cir. 1990) 8-9, 13

Altech Controls Corp. v. EIL Instruments., Inc.,
8 Fed. Appx. 941 (Fed. Cir. 2001).....8, 12

J.P. Stevens & Co. v. Lex Tex Ltd. Inc.,
747 F.2d 1553 (Fed. Cir. 1984), *cert. denied*,
474 U.S. 822 (1985).....6

Leinoff v. Louis Milona & Sons, Inc.,
726 F.2d 734 (Fed. Cir. 1984) 5

Petrella v. Metro-Goldwyn-Mayer, Inc.,
134 S. Ct. 1962 (2014)..... *passim*

SCA Hygiene Prods. Aktiebolag v.
First Quality Baby Prods., LLC,
807 F.3d 1311 (Fed. Cir. 2015).....1, 5, 6

Serdarevic v. Advanced Med. Optics, Inc.,
532 F.3d 1352 (Fed. Cir. 2008) 8, 12

Technology for Energy Corp. v.
Computational Sys.,
1993 U.S. App. LEXIS 24556 (Fed. Cir. 1993).....9

Cited Authorities

Page

Universal Electronics, Inc. v.
Universal Remote Control, Inc.,
8:12-cv-00329 AG (JPRx), C.D. Cal. ..... *passim*

Universal Electronics Inc. v.
Universal Remote Control, Inc.,
8:13-cv-984 AG (JPRx), C.D. Cal. 2

Universal Remote Control, Inc. v.
Universal Electronics, Inc.,
30-2016-00849239-CU-BT-CJC,
Sup. Ct. of Cal. 3

Universal Electronics Inc. v.
Universal Remote Control, Inc.,
Appeal No. 15-1410 2

Universal Electronics Inc. v.
Universal Remote Control, Inc.,
Appeal No. 15-1440 2

Universal Electronics Inc. v.
Universal Remote Control, Inc.,
Appeal No. 15-1561 2

Universal Electronics Inc. v.
Universal Remote Control, Inc.,
Appeal No. 16-1055 2

Page

STATUTES AND OTHER AUTHORITIES

17 U.S.C. § 507(b) 4

35 U.S.C. § 282 . . . . . 4, 5, 6

35 U.S.C. § 286 . . . . . 4, 5, 6, 16

Sup. Ct. R. 37.3 1

INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae, Universal Remote Control, Inc. ("URC"), is involved in the design and manufacture of universal remote control devices. Having recently availed itself of the doctrine of laches, *inter alia*, to defend itself successfully against a much larger competitor's baseless patent infringement lawsuit, URC submits this brief to provide the Court with information on how a laches defense was properly applied in a case beyond the particular situation in the subject *SCA/First Quality* case, and thus should be retained. *See, Universal Electronics, Inc. v. Universal Remote Control, Inc.*, 8:12-cv-00329 AG (JPRx), C.D.Cal. (the "California Litigation").[2]

The California Litigation is the subject of several appeals before the Federal Circuit Court of Appeals.

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1. No party's counsel to this case authored any part of this brief. No party, party's counsel or other person besides URC contributed money to fund the preparation or submission of this brief.

Counsel for *amicus curiae* who drafted this brief has had no involvement in this case on behalf of any party. In other non-litigation, intellectual property matters unrelated to this case, the law firm for *amicus curiae* has represented, and currently represents, the First Quality respondents.

Pursuant to Supreme Court Rule 37.3, Petitioners' counsel of record consented to the filing of this brief by filing a blanket consent with the Clerk. Respondents' counsel of record individually consented to the filing of this brief.

2. The California Litigation involved four patents in suit. URC ultimately prevailed on all four of these patents, but URC's successful laches defense related to U.S. Patent No. 5,414,426.

The first appeal is captioned *Universal Electronics Inc. v. Universal Remote Control, Inc.*, Appeal No. 15-1410 ("the URC Appeal"), in which URC appealed the district court's decisions on patent misuse and unclean hands. In the second appeal, captioned *Universal Electronics Inc. v. Universal Remote Control, Inc.*, Appeal No. 15-1440 ("the URC II Appeal"), Universal Electronics Inc. ("UEI") appealed from the Final Judgment which included, among other things, the district court's ruling on laches.[3] In the third appeal, captioned *Universal Electronics Inc. v. Universal Remote Control, Inc.*, Appeal No. 15-1561 ("the URC III Appeal"), URC appealed the district court's decision to limit the attorney's fees award, based in significant part on the district court's finding of laches, to certain parts of the case only. In the fourth appeal, captioned *Universal Electronics Inc. v. Universal Remote Control, Inc.*, Appeal No. 16-1055 ("the URC IV Appeal"), URC appealed the amount of the attorney's fees awarded on the part of the case for which fees were granted.[4]

URC is also involved in a second California litigation with UEI in which it asserts ten (10) more patents against URC.[5] That case is captioned *Universal Electronics Inc. v. Universal Remote Control, Inc., 8:13-CV-984 AG (JPRx), C.D. Cal.* ("the California II Litigation"). In that case, like the California Litigation, laches will be a crucial defense because UEI is again asserting patents, many

3. The URC II Appeal has now been voluntarily dismissed by UEI.

4. UEI cross-appealed the URC IV Appeal but has also dismissed that appeal.

5. Reduced to four patents in the Third Amended Complaint filed 8/22/16.

of which had expired three years before the suit was even filed, against products that URC has been selling in competition with UEI products for over ten (10) years. Also, on April 28, 2016, URC filed an action against UEI, captioned *Universal Remote Control, Inc. v. Universal Electronics, Inc.*, 30-2016-00849239-CU-BT-CJC, Sup. Ct. of Cal., ("the California III Litigation"), for malicious prosecution. This action is in part based on UEI's alleged knowledge of its laches in prosecuting its original action against URC. Thus, URC has an interest in this case because the decision here could affect the outcome of the pending California Litigations and the appeals relating to the California Litigation.

SUMMARY OF ARGUMENT

The holding in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962 (2014) that laches is no defense to a copyright infringement suit brought within the Copyright Act's statutory limitations period should not predicate a similar bar to the application of laches in a patent action.

As First Quality explains in its brief, there are compelling legal, historic, and policy reasons for maintaining the laches defense in patent law.

URC brings to the Court's attention its real-world experience in how laches worked properly to defend URC in decade-old litigation brought vexatiously against it by a competitor and urges that the doctrine remain viable for others in similar situations.

ARGUMENT

I. Laches Should Remain Applicable To Bar a Claim For Patent Infringement Brought Within The Six-Year Damages Limitations Period Established By 35 U.S.C. § 286

A. *Petrella's* Reliance on the Statute of Limitations in the Copyright Act Does Not Bar Laches In A Patent Case

In *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), the Supreme Court held that in a copyright action, "laches ... cannot be invoked to preclude adjudication of a claim for damages brought within the three-year window" [of the limitations period established by 17 U.S.C. § 507(b)]. *Id.* at 1967. *Petrella* reasoned that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Id.* at 1974. This bar to the doctrine of laches in copyright actions should not be invoked to reverse the decision below or to override *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992), as its rationale does not apply to actions under the patent statute.

As explained by First Quality, in 1952 Congress codified the long-standing laches defense into the patent statute in 35 U.S.C. § 282. Accordingly, the reasoning of *Petrella*, which was based on a concern that applying a court-created laches defense alongside a statute of limitations would "jettison Congress' judgment on the timeliness of suit," *Petrella*, 134 S. Ct. at 1967, does not apply to the separate statutory structure of patent law.

As *Petrella* recognized, "[w]hen Congress fails to enact a statute of limitations...laches is not invading congressional prerogatives. It is merely filling a legislative hole." *Petrella*, 134 S. Ct. at 1968. Thus, in addition to Congress' express judgment that laches should continue to be a defense in patent law under section 282, *Petrella's* separation of powers concern is not even raised by applying laches alongside Section 286.

Section 286 in the Patent Act has always been considered a damages proscription, not a statute of limitations. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1321 (Fed. Cir. 2015) ("§ 286 is a damages limitation. The statute does not preclude bringing a claim..."); *Aukerman*, 960 F.2d at 1030 ("*section 286* is not a statute of limitations in the sense of barring a suit for infringement."); *Leinoff v. Louis Milona & Sons, Inc.*, 726 F.2d 734, 741 (Fed. Cir. 1984) ("Since there is no statute from which to determine the timeliness of an infringement action, vis-a-vis the patentee's first knowledge of infringement, courts use the equitable doctrine of laches.") Thus, notwithstanding the Federal Circuit's holding below that it saw "no substantive distinction material to the *Petrella* analysis between § 286 and the copyright statute of limitations...," *SCA Hygiene Prods.*, 807 F.3d at 1321, the Section 286 "damages limitation" in the patent statute still leaves a "legislative hole" – *i.e.*, the initiation of stale claims – that Congress has long allowed to be filled by the doctrine of laches.

As occurred in URC's case and will be discussed in detail below, a patentee could sit back, unreasonably and inexcusably lie in wait for ten (10) or more years, while key evidence disappears and a defendant grows his business,

perhaps an entire industry. A patentee can then jump in at the end of the life of its patent to profit from its belated effort, content to recover damages for only the last six (6) years of infringement. Those are possibly the most lucrative years for a patentee to seek damages.

It is, thus, still necessary, appropriate, and fair to fill that gap in Section 286 of the Patent Act by retaining the doctrine of laches, which Congress has done in Section 282 of the Act. It would be legal error to extend *Petrella* from the copyright realm to the patent law.

B. The Federal Circuit Has Long Recognized That Laches Is Codified in the Patent Act Without Congressional or Supreme Court Correction

Over 20 years ago, in *Aukerman*, the Federal Circuit reviewed and upheld that the doctrine of laches is applicable in patent actions. The Court noted that Section 282 of the Patent Act [now 282(b)(1)] expressly reads:

> The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded: (1) Noninfringement, absence of liability for infringement, or unenforceability.

Aukerman, 960 F.2d at 1029. The Federal Circuit has always interpreted this paragraph of Section 282 as including the "equitable defenses such as laches, estoppel and unclean hands." *Id., citing J.P. Stevens & Co. v. Lex Tex Ltd. Inc.*, 747 F.2d 1553, 1561 (Fed. Cir. 1984), cert. denied, 474 U.S. 822 (1985). And as stated once again by the court below in this action: "Congress codified a laches defense in § 282." *SCA Hygiene Prods.* 807 F.3d at 1323.

Laches may be defined as "the neglect or delay in bringing suit to remedy an alleged wrong, which taken together with lapse of time and other circumstances, causes prejudice to the adverse party and operates as an equitable bar." *Aukerman*, 960 F.2d at 1029; *see also, Petrella*, 134 S. Ct. at 1967 ("unreasonable, prejudicial delay in commencing suit.")

In particular, for a defendant to invoke a laches defense, it has the burden to prove:

> 1) The plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of its claim against the defendant, and
>
> 2) The delay operated to the prejudice or injury of the defendant.

Aukerman, 960 F.2d at 1032. It is the policy reasons underlying this second element that *amicus curiae* wishes to expound upon as a basis to retain the doctrine. Indeed, it is this very doctrine that operated to properly protect URC in the California Litigation from enormous potential liability against a competitors' harassing resurrection of an old grievance and thus demonstrates why the doctrine should endure.

For a laches defense to succeed, a defendant must show that the requisite prejudice exists, which may be economic and/or evidentiary. Evidentiary prejudice arises "by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the

death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge the facts." *Aukerman*, 960 F.2d at 1033. Economic prejudice arises where the defendant "will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit." *Id.*

Many examples abound in patent jurisprudence of how laches has been invoked to prevent such unfair prejudice. For example, in *Altech Controls Corp. v. EIL Instruments., Inc.*, 8 Fed. Appx. 941, 951 (Fed. Cir. 2001), the Court upheld a laches defense where the defendant presented evidence of evidentiary prejudice due to a policy of shredding, after five years, relevant documents that it would have needed for its defense.

In *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1360 (Fed. Cir. 2008), the Court affirmed a finding of laches where the plaintiff failed to rebut a presumption of evidentiary prejudice because three witnesses with knowledge of her claim to be an inventor on certain patents "died during the period of her delay" and because of the "cumulative and inherent prejudice from the dimming memories of all participants." *Id.* The Court specifically noted the lower court's reasoning that "their deaths prevent the defendants from fully investigating [plaintiff] Serdarevics' claims." *Id.* at 1361.

While these evidentiary losses make defending a stale infringement claim difficult or even impossible, an equally important issue is the economic prejudice that can result from delay. It has been held that "[m]aking heavy capital investment and increasing production can constitute prejudice." *Adelberg Labs, Inc. v. Miles, Inc.*,

921 F.2d 1267, 1272 (Fed. Cir. 1990). In *Adelberg*, economic prejudice was a basis for laches where that defendant built up its business by the seventh year of plaintiff's delay, where it had reason to believe the plaintiff would not sue. The Federal Circuit noted that "[t]his activity could have been costly to Cutter if [plaintiff] Adelberg had successfully sued and recovered lost profits or increased damages to compensate for the infringement. Thus, [defendant] Miles has shown adequate prejudice by [plaintiff] Adelberg's delay in bringing suit." *Id.*; *see also Technology for Energy Corp. v. Computational Sys.*, 1993 U.S. App. LEXIS 24556, at *21 (Fed. Cir. 1993) (affirming judgment of laches where defendant "expended considerable capital to expand its business in terms of, among other things, employees, sales, and investment in research and development during TEC's period of delay.")

Throughout these decades of application of the laches doctrine, Congress has never acted to eliminate the laches defense in patent law. While there has been significant legislative patent reform in the past few years, none of these Congressional actions have even hinted at, or tried to modify, the law relevant to the laches doctrine. Further, none of the applications of laches discussed have invoked this Court's review. Thus, silence by Congress despite ample opportunity to make changes and a history of making other adjustments to the statute is a strong indicator that the laches doctrine should remain viable and unchanged.

C. Without Laches, URC Would Have Faced Material Prejudice In Its Defense

As would typically result to most defendants, in the absence of laches, URC could have faced severe prejudice, both evidentiary and economic, had UEI's decade old charge of infringement not been barred and URC was unable to prevail on its other defenses.

URC, for the past 15 years has steadily risen to become a successful competitor in the cable remote control industry and in retaliation was subject to, and is still being subject to, harassing litigation by its much larger competitor, UEI, which has over 70% of the U.S. cable market. Laches was one essential component in URC's arsenal of defenses. Through discovery, URC learned and the district court recognized that UEI filed the California Litigation for an improper purpose, as payback for losing business to a major cable company and without regard to any reasonable pre-suit investigation into the merits of filing such a case. (Case No. 12-00329, C.D. Cal., Dkt. 475, at 5). URC also learned through discovery that once URC won that business, UEI embarked on an aggressive campaign to eliminate URC from the cable remote market.

In the California Litigation, URC prevailed on summary judgment of non-infringement on one of the patents-in-suit. At trial on that same patent, URC prevailed on invalidity based upon incorrect inventorship. The jury also rendered a verdict that the claims under this patent were unenforceable due to laches. In a post-trial ruling, the district court treated that jury verdict as advisory and found as well that laches barred the assertion of this patent.

Thus, while URC was successful on other defenses, laches was an important issue tried to the jury and the subject of intense post-trial briefing, and therefore was crucial to protect URC against liability for UEI's late claims of patent infringement. It is for these reasons, and in the interests of fundamental fairness in our judicial system, that URC urges this Court to retain the doctrine as a viable defense to patent litigation.

The California Litigation was not the first time UEI sued URC. UEI had filed an earlier suit in 2000, which ended in a pre-trial settlement. Thus, by the time of the California Litigation in 2012, UEI had been aware of URC and of URC's product lines since the late 1990's. In the settlement negotiations for that early case in 2002, URC advised UEI that one of the asserted patents (U.S. Patent No. 5,414,426) was invalid due to certain prior art. Plaintiff UEI maintained that there was an inventorship error in the asserted patent that it was prepared to "correct" by adding an inventor, and in so doing, claim entitlement to a priority date before the relevant prior art. However, rather than correct the inventorship issue, UEI dismissed its claims under that patent.

In view of the invalidity of the patent and UEI's dismissal, URC thereafter continued to engage in open and notorious competition with UEI and expanded its product line with the allegedly patented feature, while UEI remained silent.

UEI waited an unreasonable and inexcusable amount of time until 2010, eight years after it dismissed the claims, to again assert against URC the very same patent. Even after sending the notice in 2010, UEI waited until 2012

to finally commence the California Litigation and did not ultimately take steps to allegedly try to "fix" the inventorship issue until after initiating that new action. In the California Litigation, not only did UEI assert the same patent, but it also asserted the patent against the same products it could have sued upon in the earlier case in 2000. (*See,* Case No. 12-00329, C.D. Cal., Dkt. 435, at 8, 11.)

Although a presumption arose in URC's favor that laches applied due to UEI's 10-year delay in filing suit, it was difficult, time consuming and expensive for URC to defend itself against UEI due to the delay and passage of time. For example, it was difficult for URC to fight UEI's attempt to add the purported inventor because URC faced the same type of evidentiary prejudice that was present in *Serdarevic.* In the California Litigation, the alleged unnamed co-inventor had passed away in the interim and UEI could not produce any emails generated prior to 2006. Moreover, other witnesses could no longer recall the alleged inventor's role in the original invention twenty (20) years earlier or why UEI waited ten (10) years to attempt to fix inventorship. The district court expressly noted the evidentiary prejudice to URC – "twenty years of delay contributes to a finding that this case is exceptional, because it created...a situation where Plaintiff could not provide any corroboration of [the inventor's] purported inventive contribution, either from Plaintiff's files, from [the inventor], or from the named inventors." (Case No. 12-00329, C.D. Cal., Dkt. 475, at 8).

Similar to the prejudice found in *Altech Controls,* UEI had not retained relevant documents going back more than six (6) years before it filed its patent infringement suit,

depriving URC of the ability to obtain documents needed to adequately defend itself.

In addition, as in *Adelberg*, URC might have faced crippling damages charges because after UEI dismissed its patent infringement claim against URC in 2002, URC continued for over a decade to build its business in directions it believed it was free to advance, investing in and adding new products with the accused feature that potentially might have been subject to attack under UEI's interpretation of its patent. URC openly sold and marketed tens of millions of devices in direct competition with UEI while UEI still failed to even attempt to "correct" inventorship of its patent. Specifically, URC's total unit sales for the accused products up to 2002 was only approximately 350,000 remote controls. A decade later, however, this had grown to over 16 million remote control units in the 2006-2012 damages period.

While URC continued and expanded its activity in direct view of UEI, UEI unreasonably and inexcusably sat back and did nothing for ten (10) years, instead waiting to use its patent as a litigation tool to unfairly thwart competition. Had UEI asserted its claim in a timely manner, URC could have avoided any potential liability by removing the allegedly infringing feature, changing to another design, or seeking to attack the validity of the patent sooner than it ultimately was successful in doing. Even if URC were ultimately unsuccessful in those attempts, as evidenced by the sales described above, URC's potential liability would have been significantly less had UEI timely brought suit before URC invested significantly in expanding this business.

Indeed, UEI's unreasonable and inexcusable delay in bringing suit contributed to URC's award of attorneys' fees. In granting partial fees to compensate URC, the district court stated "[p]laintiff's assertion of the [patent-in-suit] despite a lengthy and unexplained lapse in time contributes to finding that this case is exceptional." (Case No. 12-00329, C.D. Cal., Dkt. 475, at 11).

In addition to the legal distinctions between copyright law and patent law which undermine extending *Petrella* to patent law, for policy reasons and fairness, the laches defense in patent actions should be upheld as a deterrent to litigants asserting stale claims. It is particularly useful to a smaller defendant who can ill afford to be dragged through baseless litigation by a larger competitor who intentionally withheld the assertion of its claims to make the accused damages devastating. The district court agreed in the California Litigation, and stated that the attorney's fees award, granted in part due to the unreasonable delay in UEI's bringing an action, "will also serve as adequate deterrence." (Case No. 12-00329, C.D. Cal., Dkt. 475, at 15). Thus, the doctrine worked properly to protect URC and should remain wholly viable for application by defendants in any appropriate case.

D. The Application of Laches Does Not Unfairly Prejudice The Patentee

While preventing prejudice and the potential economic ruin of an accused infringer, the application of laches does not unfairly prejudice a patentee. Although the delay element of the defense is presumed after six (6) years, there are many recognized situations where a plaintiff's delay is excusable. For example, "other litigation ... negotiations with the accused ... possibly poverty and

illness ... wartime conditions ... extent of infringement ... and dispute over ownership of the patent" have all been held reasonable excuses in certain circumstances for a plaintiff's delay. *Aukerman*, 960 F.2d at 1033.

In the California Litigation, laches did not prejudice UEI. As the district court found, UEI had no reasonable excuse for sitting on its rights for an unreasonable period of time and thus had nobody to blame but itself for the application of laches. The district court stated that "[the situation giving rise to laches to block UEI's claim] was created by Plaintiff, and in spite of it, Plaintiff inflicted the cost of defending a claim that Defendant infringed the '426 Patent." (Case No. 12-0329, C.D. Cal., Dkt. 475, at 9).

In *Aukerman*, this Court stated that "a determination of laches is not made upon the application of 'mechanical rules.' ... A court must look at all of the particular facts and circumstances of each case and weigh the equities of the parties." *Aukerman*, 960 F.2d at 1032.

This balancing of interests is essential and fundamentally fair in determining whether an accused infringer's activities in investing and continuing its business were reasonable in view of a plaintiff's diligence in asserting its patent rights once the patent owner became aware of the infringement. After all, the patentee is in the better position to know when his or her rights accrue as the holder of the patent and can police the relevant field of use. In contrast, there are millions of patents in existence and thousands added every year. Even where a manufacturer diligently attempts to screen and identify those patents that may affect the products they are producing, it is not always possible to identify all relevant patents prior to a particular product's introduction. It is more efficient and

equitable for a patent owner to notify a potential infringer in a reasonable and justifiable timeframe once they believe the alleged infringer has strayed into protected territory, rather than prey on the alleged infringer's business success after unreasonably and intentionally withholding its right to assert infringement claims to take maximum advantage of inadvertent infringers. The business reality for competitors in a market for consumer goods cannot be overstated: delaying suit unreasonably by a patent owner and waiting for the alleged damages to accrue as unsuspecting manufacturers keep expanding potentially infringing product lines is grossly unfair and undermines fairness of our judicial system. Laches is essential to deter this inequity.

CONCLUSION

For the reasons set forth herein, the Court should hold that laches is available to bar a claim for patent infringement within the six-year damages limitation period of 35 U.S.C. § 286.

Respectfully submitted,

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